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No. 78-1138

In the Supreme Court of the United States

OCTOBER TERM, 1978

LAURA BARKER AND MAMIE BARKER, PETITIONERS

v.

COMMODITY FUTURES TRADING COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. In 1974 Congress amended the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*, expanding its coverage to encompass almost all commodities and creating the Commodity Futures Trading Commission to administer and enforce the Act's provisions. The Act creates a comprehensive scheme for the regulation of commodity futures and related markets. One new feature of the system of regulation is the reparation procedure contained in Section 14, 7 U.S.C. 18. That section authorizes the Commission to provide an administrative forum for the adjudication of complaints by members of the public who claim to have been injured by violations of the Act or the Commission's rules, when the asserted violations were committed by persons required to register with the Commission under certain provisions of the Act.[1] If, in

[1]The Act requires registration of futures commission merchants and associated persons, floor brokers, commodity trading advisors and commodity pool operators. Sections 4d, 4e, 4k and 4m of the Act, 7 U.S.C. 6d, 6e, 6k and 6m.

the Commission's opinion, the facts alleged by a complainant warrant the institution of a proceeding, the case may be heard and decided by an administrative law judge or by the Commission itself (7 U.S.C. 18(b); 17 C.F.R. 12.101). If the Commission finds that the Act has been violated, it may enter an award directing the registrant to compensate the complainant for any damages sustained.[2]

The effective dates of the Commission's reparations authority are set forth in Section 14(i) of the Act, which provides that: "[T]he provisions of this section shall not become effective until fifteen months after the date of its enactment: *Provided,* That claims which arise within one year immediately prior to the effective date of this section may be heard by the Commission after such fifteen months period" (7 U.S.C. 18(i)).[3] The 1974 amendments were signed into law on October 23, 1974 (see 88 Stat. 1389), and Section 14 therefore did not become effective until January 23, 1976. Thus, the Commission will not consider a reparation complaint with respect to claims that arose before January 23, 1975—one year prior to the effective date of Section 14. See 17 C.F.R. 12.21.

2. On December 14, 1976, petitioners filed with the Commission a reparation complaint against Commodity Management System, Inc. and E. F. Hutton & Co., Inc. Their complaint alleged that these commodity firms had

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[2]Subject to an aggrieved party's right to seek judicial review in a court of appeals (7 U.S.C. 18(g)), the Commission's order is conclusive (7 U.S.C. 18(f)). An order awarding reparations may be enforced against the commodity professional in a district court (7 U.S.C. 18(f)).

[3]Section 14(i), as originally enacted in 1974, provided that the Commission's reparations authority would become effective one year after the date of enactment and would apply to claims arising no more than nine months prior to that date. 88 Stat. 1395. In 1975 Congress adopted Pub. L. No. 94-16, 89 Stat. 77, which amended Section 14(i) by extending the effective dates to 15 months and one year.

defrauded petitioners in connection with certain commodity futures transactions, resulting in financial injury to them. All but four of the commodity futures transactions, which petitioners alleged they entered into as a result of the unlawful conduct of these firms, occurred before January 23, 1975 (Pet. App. vi n.2).

An administrative law judge dismissed petitioners' complaint for lack of jurisdiction, both because the complaint's allegations were the subject of a pending action brought by petitioners against the commodity firms in a state court[4] and because most of the transactions occurred before January 23, 1975 (Pet. App. xi-xiii). The dismissal was without prejudice to refiling if the state case concluded without a disposition on the merits (*id.* at xiii).

The Commission vacated this order and stayed the proceeding based on the pendency of the state court action (Pet. App. vii-x). In response to petitioners' request

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[4]In order to avoid possible duplicative litigation and inconsistent rulings, the Commission ordinarily will not permit a person to utilize its administrative reparation forum to litigate a claim that is concurrently being asserted in court or arbitration. See 17 C.F.R. 12.21(a)(7). The Commission explained in adopting this regulation that:

> the utilization of either an arbitration proceeding or civil court litigation is a waiver of the remedies available under the reparation procedures if the arbitration proceeding or court litigation is pursued to a final decision on the merits. In order to prevent the utilization of the reparation procedures while an arbitration proceeding or civil court litigation is pending, based on the same facts set forth and against the same party or parties named in a complaint, the Commission has determined to require the complainant to set forth in the complaint any pending arbitration proceeding or court litigation based on the facts set forth and against the same party or parties named in the complaint. Should such an arbitration proceeding or court litigation be pending at the time the reparation complaint is filed with the Commission, the Commission will ordinarily stay the reparation proceeding pending a decision by the arbitration panel or court.

41 Fed. Reg. 3994 (1976) (citation omitted).

for clarification, the Commission issued a further order dismissing "those portions of the complaint which allege damages arising out of trades effected prior to January 23, 1975" (*id.* at v) but continuing the stay with respect to the claims that, although not time-barred, were the subject of petitioners' state court action.

The court of appeals dismissed the petition for review "for want of a full exhaustion of administrative remedies as evidenced by a final administrative order disposing of all of petitioners' claims" (Pet. App. iii).

3. The decision of the court of appeals is correct, and there is no reason for review by this Court. Section 14(g) of the Act, 7 U.S.C. 18(g), authorizes judicial review of orders granting or denying reparation awards. But judicial review generally is limited to final orders. 5 U.S.C. 702. There has been no final order here because some claims in petitioners' reparation complaint still are pending before the Commission. An order disposing of some but not all of the claims in a case is not final. The court of appeals consequently did not consider the merits of petitioners' argument that the Commission has jurisdiction to award reparations for transactions consummated before January 23, 1975, and there is no reason for this Court to consider that contention, which is, in any event, untenable.

Petitioners are free either to pursue their pending action in state court or to dismiss that action. If they dismiss their action, the Commission's order staying the reparation proceeding could be vacated. Petitioners would be able to proceed with their claim on the four futures transactions effected after January 23, 1975, and they could receive full judicial review thereafter.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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